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ABSTRACT

Designed to highlight business opportunities of the 1990s as well as available educational programs relating to international business, this report contains six presentations from a 1990 conference on international trade hosted by Midland College (MC). The first article, "Texas in the Global Economy: Attitude and Opportunity," by John A. Adams, Jr., focuses on Texas entrepreneurs and how Texas compares with other states in terms of exporting. Next, "How To Succeed in a Globally Competitive Market Environment," by Lee Gordon, examines strategies which the Midland area might utilize to take advantage of international business opportunities as part of its overall economic development. "Where To Find International Trade Answers," by David L. Dillard, presents sources of information on international trade, including periodicals, reference materials, and on-line databases. In "How Can the State Help Pay for My Exports?" Eduardo Sosa describes the four services available to Texas exporters through the Texas Export Finance Office. "The International Freight Forwarder," by Delbert R. Henry, reviews important considerations in choosing an international freight forwarder and in undertaking successful transport. The final article, "When and Why Do I Need Legal Advice To Export?" by Lawrence Johnson, examines the legal side of exporting, including dealer legislation, foreign exchange regulations, property rights, and tax and duty issues. (JMC)

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FOCUS ON THE 1990'S INTERNATIONAL TRADE OPPORTUNITIES FOR THE PERMIAN BASIN

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MIDLAND COLLEGE

The Midland College Business and Economic Development Center provides many resources enabling people to learn more about international trade. The Business and Economic Development Center is recognized as an Export Assistance Center by the Texas Department of Commerce.

The Center is equipped with a computer terminal and modem. International trade leads and exporting information is downloaded from the Texas Department of Commerce Bulletin Board each week. Trade leads are also available from the U.S. Dept. of Commerce "Hot Trade Leads" files and the Journal of Commerce publication. These leads are provided to the Midland Reporter-Telegram and interested individuals and organizations. Trade leads can be provided for a specific industry or country.

The Center also provides a software package to assist individuals or companies in assessing their readiness in the field of exporting. This software, CORE (Company Readiness to Export), compares an individual company to other companies on two dimensions, organization and product. The CORE program may be used systematically to identify a company's strengths and weaknesses in exporting.

A number of programs are available that can help you to enter international markets or expand your existing operations.

Specific information that can be found within these resources include:

- Which country to market your product
- How to find buyers in that country
- How to obtain information about duties, taxes, trade barriers and general country information
- How to find suppliers and manufacturers in Texas for a foreign company in need of a product
- How to get an export license
- Description of Standard Industrial Classification codes

For further information on this publication, or the Business and Economic Development Center and its resources, please contact:

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FOCUS ON THE 1990'S
INTERNATIONAL TRADE OPPORTUNITIES FOR THE PERMIAN BASIN

A Publication of
The Business and Economic Development Center
Midland College

We would like to express our appreciation to the following sponsors for their support of the program "Business Expo 1990" held on May 10, 1990:

Permian Basin Private Industry Council
Midland College
Midland Chamber of Commerce
Midland Reporter-Telegram
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Students in Free Enterprise
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We would also like to acknowledge the following speakers for the time and efforts they gave to make "Business Expo 1990" a success:

John A. Adams, Jr.
Lee Gordon
Lawrence Johnson
Eduardo B. Sosa
David L. Dillard
Delbert R. Henry

The goal of this international trade publication is to highlight business opportunities of the 1990's as well as the education programs that are available.

With the combined efforts of the Permian Basin Private Industry Council and the Business and Economic Development Center, doing business overseas is no longer a prospect out of reach for owners of small businesses who wish to broaden their marketing base, promote sales growth and increase production.

In addition, we would like to express our appreciation to the following people for their many hours spent in preparing this publication:

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TEXAS IN THE GLOBAL ECONOMY: ATTITUDE AND OPPORTUNITY

By John A. Adams, Jr., PhD.
Managing Director, InfoNational, Inc.; Dallas, Texas

The participation of Texas in the global economy has long been a hallmark of the state's growth and dominance in the sector of agriculture and energy. In recent months this solid base has shifted, leaving many opportunities for the future of the Texas economy. One such opportunity is to broaden and diversify the economic and industrial structure to include an aggressive statewide effort to "go international."

Exporting is vital to the state's welfare. There are currently over 400,000 Texas jobs directly related to export activity. For every $1 billion in export activity, more than 25,000 jobs are generated. Yet, the full impact and potential of the broadened Texas economy to take part in exporting has yet to be realized.

Texas is not alone. Over the past decade our entire nation lagged seriously behind. A survey of eight major trading powers ranks the United States last in per capita spending on export promotion as a percentage of GNP. At $1.20 per capita, the U.S. trails Germany, its nearest competitor, which spends $1.67 and lags far behind its nearest neighbor, Canada, which ranked number one with $21.44 per capita. Notwithstanding, the U.S. has made dramatic strides in narrowing the overall trade deficit.

Texas Entrepreneurs

Texas' laissez-faire entrepreneurial and free enterprise environment has long encouraged innovation, creativity, and growth. Yet, such growth until the late 1980's has been both regional and provincial. Past prosperity did not call for, nor encourage, a statewide attitude toward diversification.

So what happened? As a result, such non-energy and non-agricultural dependent states as California, Georgia, Illinois, Delaware, Colorado, Minnesota, Michigan and Ohio have moved to the forefront of a multi-level, diversified industrial approach to enhance jobs, growth and exports.

Such diversification has begun to take place in Texas. In a survey of over 1,500 Texas businesses, the Center for International Business Studies (CIBS) at Texas A&M University determined in 1988 that of those Texas businesses not currently involved in international business over 35 percent indicated that they felt their product or service was exportable. In this sample more than 63 percent of industrial developers surveyed felt there were companies in their areas that could export but, for one reason or another, do not.

This survey highlighted the following primary factors that discourage international trade:

- nearly 30 percent cited lack of information and "education" on foreign markets as the key factors most discouraging international business activity,
- 23 percent cited fear of international business,
- 15 percent indicated the reluctance of financial institutions to provide financial assistance, and
- 14 percent stated that international business was too difficult and expensive.

Thus, Texas has had to make adjustments in the way it viewed opening new markets. Today we live in a global economy marked by faxes, overnight package delivery and a variety of 24-hour services. To this end, business and industry have begun to display a more open view toward the world.

Furthermore, there is no product or service that is not "exportable". We export tumbleweed to the Japanese floral market, ice makers to Iceland, sand to Egypt, and Texas rice to Korea.

The key to the continued internationalization of the Texas economy is the fostering of a broad based attitude to export and an ongoing effort to raise the level of

awareness of what it actually takes to "go international." Many companies would not think twice to ship open account to Missoula, Montana, or Anchorage, Alaska, yet would balk at an equally sized order to Mexico, Spain or Taiwan.

If there is a reluctance to be involved in direct exports a company can lower its perceived risk by becoming a supplier to a multitude of large international companies based in Texas. Additionally, the growing Texas-Mexico border maquila market has yet to be fully tapped. The prime source for leading export companies in the state can be found in the **Texas International Business Directory** and the InfoTrade Online database, both developed by InfoNational, Inc.

The following Texas products and services -- to name but a few -- are in high demand for export markets:

* medical equipment and services,
* specialty oilfield parts and machine tooling
* electronic components,
* spare parts of all kinds -- auto, industrial, agricultural,
* biotechnology,
* telecommunications,
* specialty chemical compounds,
* construction products and services, and
* fabricated metal.

How has Texas compared?

In 1986 Texas ranked 45th in state-coordinated efforts to promote exporting. The bottom five states basically had no export/international program at all. California has allocated more than 20 times the amount being spent by Texas with dramatic result. However, with creation of the Texas Department of Commerce in 1987, this trend is slowly changing. Thus far, TDOC has had a somewhat slumbering evolution as it formulates the direction of its programs. These initial efforts by the Texas Department of Commerce need to be continuously accelerated.

What is needed is a pro-active in-state cooperative effort as well as an external outreach program to sell Texas products abroad. Foreign trade offices in Taiwan, Mexico City and Frankfurt are vital to the state's domestic economy. Exports are profitable and save jobs!

The current direction and planned programs of the Texas Department of Commerce include the following:

* TDOC has targeted small to medium-sized businesses as a focus to encourage exporting,
* The department has a set up a number of assistance centers statewide to aid businesses,
* They plan to facilitate an information data bank to handle trade leads, and make those leads available to Texas businesses,
* The department has co-sponsored a number of foreign trade missions and set up foreign trade offices in Mexico, Japan and Taiwan, and
* A bond-backed export financial assistance program is now in place at the state level and Eximbank assistance is being developed.

This last item, an export loan program implemented in the fall of 1989, could have the greatest impact on "facilitating" small to medium-sized companies to export.

The Commerce department's job in Texas should be an easy one to carry forward, primarily because there is an excellent growing infra-structure within Texas, including

* the booming border Maquila economy
* the presence of numerous in-state international airports
* major port facilities in Houston and Corpus Christi,
* active pro-international Chambers of Commerce,
* excellent natural resources and a fair climate, and
* introduction of international courses into both high school and college level programs.

All things considered, the recent paralysis in the Texas banking and savings and loan industry is one of the few weak spots, thus making the bond-backed finance program even more urgent. Texas banks can no longer be looked to as the "venture capitalists" they were in the late 1970's and 1980's. Additionally, there is a tremendous amount of export assistance via numerous agencies and development groups to include the U.S. Department of Commerce, SBA, the SBDC's, SCORE chapters, various Chambers with international divisions, university programs, and the Texas Department of Commerce to name but a few.

Persistence, follow-through and a long run perspective are critical to

the success of a profitable export policy. International business deals for the most part do not happen automatically; thus a "fear barrier" in many companies must be overcome. Export hassles, documentation and shipping procedures must be understood to facilitate the resulting opportunity.

Given the fallout in banking and downturn of the traditional areas of agriculture and energy, Texas is at an unprecedented turning point in its industrial history. To take full advantage of these changing events and trends Texas companies must put the past behind them and give more than lip service to developing a timely and effective export strategy. Such an assessment should include:

* approval at the top level of management to "go international,"
* flexibility to target new global markets,
* education of employees on international business issues,
* careful selection of new products,
* consideration of license agreements and joint ventures and,
* practical, NOT theoretical strategies

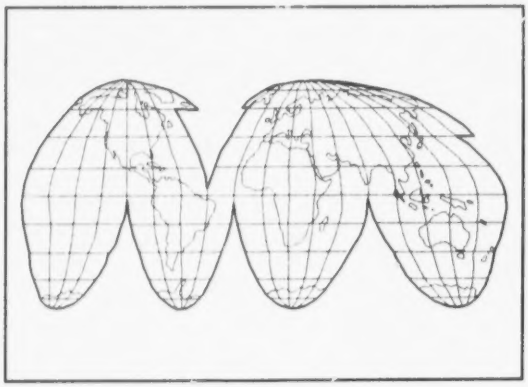
Finally, it is time for Texas to capitalize on its diversification. To do this, Texas needs an ongoing pro-active, favorable political climate at the higher levels in Austin. Texas is taking the steps to diversify its economic base and provide cooperative assistance via the Texas Department of Commerce. Yet, much needs to be done.

The bottom line

If you are not in international business by the early 1990's, you can be assured that you could miss or lose as much as 25 to 30 percent of your potential gross sales. Given the relative value of today's dollar vis-a-vis many foreign currencies, the demand for American products, expertise and assistance is tremendous.

For a landlocked inland city like Midland, this will mean a conscious creation of a global mindset, and international attitude. It will mean unified focus that coordinates all the talent and ingenuity as well as human and financial educational resources available to introduce West Texas to the world. It will mean diligent research to identify and deploy every source of help, public and private, that is available to you to make maximum use of every arrow in the quiver that might help you hit the global target.

Now is the time to "go international."



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How to Succeed in a Globally Competitive Market Environment

Lee Gordon
International Business Professor
Coastline College, California

I would like to focus my remarks on identifying strategies which Midland may want to consider to take advantage of international business opportunities as part of its overall economic development efforts. I appreciate the Business and Economic Development Center of Midland College's invitation to meet with you today and talk about some of the programs which we have developed in this area in California which may be of interest to your business community.

We, in Orange County, California have several common concerns with West Texas with respect to economic development. Like you, we are working toward the diversification of our economy into areas which will be viable for the long term. In our case it is the anticipated decline in defense spending which is drawing the attention of community leaders. The City of Irvine, CA hosted a major conference on economic diversification, earlier this year, to address this need. Last month, the City Council of Irvine approved a plan to target International Business as the centerpiece of the city's economic development program. I believe that Midland may benefit from a similarly focused effort.

Like you, we have seen interest in the promotion of retirement developments as a spur to economic growth. In my brief time in your city I have noticed that you have all the elements necessary to recruit the "SnowBirds" from up North to relocate. You have a mild climate with enough variability to let one appreciate the changing of the seasons. You, unlike my city, have very attractively priced housing, a real concern to folks living on fixed incomes. The pride in family values is evident here and that is also of concern to senior citizens. And perhaps of most importance for the senior citizens that I know, you offer the chance to play golf year round. As you know, the immigration of retired people can give a terrific boost to an economy. Senior Citizens do not place the same demands on social services such as education and police as other demographic groups do and they create new business opportunities by their spending patterns which are not dependent on the retention of employers. I believe that if an effective promotional effort is put together, you can achieve very desirable results in this area.

Ironically, the lack of affordable housing and highly priced commercial real estate in my area may create new business opportunities for West Texas. The May 9th edition of the Orange County Register, which is the flag ship paper of the company that owns the Odessa American, contained a story highlighting the success that western states are experiencing in attracting Orange County manufacturers to relocate. We are seeing dozens of companys abandon our area for areas that offer higher quality of life and housing that is within reach of a companies workforce. I think this offers an outstanding opportunity for Midland, as you have so many of the factors that we lack. Nevada, Arizona, Utah and New Mexico have succeeded in relocating major Orange County firms. I am sure that with an effective promotional campaign, West Texas can be on that scoreboard.

But, wait, you may be thinking, what does this have to do with international business? These are local or western states concerns. I can only repeat what the President of Chapman College in Orange County has said on many occasions, "If you are not involved in international business in a few years, you may not recognize the business that you are in."

Today, world trade is the concern of small and mid-sized firms as well as larger companies.

Let me give you two examples from

companies that have students enrolled in my classes this semester. I have a student who is a value-added reseller of truck parts. He offers the same parts which a business can buy directly from a large Southern California wholesaler at a higher price to Southern California customers. Why do they buy from him? SERVICE. He delivers the needed part the same day that it is ordered rather than the 3-4 days that some of the wholesalers take. He has learned that the same attention to service and detail works in international markets and, because of his excellent computerized inventory, has discovered markets in several countries for the same items. His is a small company with less than 10 full time employees, yet he has targeted the international sector as his main focus of growth.

I have another student whose company has been in the business of printing brochures for twenty years. You would think that this would be free from overseas competition because of the need to deliver the product from a customized order in a matter of days. My student tells me that because of the ease of shipping overnight, internationally, via Federal Express, he is seeing strong competition from Southern California based sales offices that actually do the printing. He now has to compete with an offshore producer that can match his delivery times. How does he do it? SERVICE. He builds value in his bids by paying personal attention to the particular needs of each client and is developing niches for himself that he will concentrate on for future growth. These are the goals of international business programs. To permit Americans to meet the challenges of an internationally competitive environment and adapt to conditions to permit businesses to grow.

My main concern for Midland's international business effort is that it be a practical, "nuts and bolts" "how to" kind of program, rather than a broad theoretical study of world events. I think you might want to have specific short term goals of creating trade linkages with the major trading areas. If you can successfully develop a single contact in Japan, in Europe and in the Latin American countries beyond Mexico, you are likely to find that those contacts can develop themselves into a range of opportunities. But you have to get started. Like the Nike ad says, "Just Do It." Get those first small deals done so that relationships can be established. Too often I have observed that this process gets bogged down in a general overview of business conditions which leaves the participants alienated when the program does not yield early results. The key issue, for me is making contacts in other countries. Well then how do you do that? The person I like to begin with is a freight forwarder. He is likely to have professional contacts in all major trading nations with whom he is on a first name basis and can relatively easily provide you with that all important first lead or referral to steer you toward an overseas business affiliate. A freight forwarder is also directly motivated to help you succeed. If you do a deal, he is going to move the cargo. I also recommend the U.S. trade development offices of major trading countries with whom we are running trade deficits. Some of these countries have begun to actively recruit U.S. exporters for the first time due to trade sensitivities ties. Following the recently concluded SII (Structural Impediments Initiative) talks, the Japan External Trade Organization (JETRO) of Japan's Ministry of International Trade and Industry, has committed itself to a major effort to help U.S. exporters enter the Japanese market for the first time. JETRO maintains an office in Houston. In addition to these two sources of leads for overseas business development, I have a series of contacts to consider, along with brief comments on each.

Where to find International Trade Answers

By David L. Dillard

for Midland College Seminar

I am in the business of helping people find solutions in the international marketplace. At InfoNational, Inc., we are daily asked where to find information in all aspects of international trade.

The first rule to remember is that no one has all the answers. If someone tells you they do, walk away. They probably don't understand the problem.

I always ask, **"What level of information do you need?"**

The sources for your answers will vary depending on the level of information you need and how you intend to apply it.

As people begin to explore international possibilities for the first time or start dealing in a new area they often need **general information** to help educate, direct attention and refine their questions. There are many resources to call upon for this type of background information and education.

Note: A word of caution - when you are trying to apply general information to your specific situation be very careful. There are almost always things specific to your application that must be considered further. Seek the counsel of experienced professionals to avoid what could result in costly mistakes.

Once someone is focused on specific areas of interest -- in a certain product or industry, in a certain country or region -- attention is normally put toward **identifying opportunities** dealing with that area of interest.

With real international opportunities in hand, the attention turns to **information to help develop opportunities** -- information to help turn an opportunity into profits in the international marketplace.

The type of detail and specificity you need will vary depending on how you intend to apply the information. For instance, for someone exploring international markets for the first time a half-day seminar given by the Department of Commerce on Exporting for the beginner might be appropriate. But, for others who are trying to consummate computer sales abroad an intensive training session on export controls for high technology industries may be needed.

Depending on the level of information needed, I recommend **sources of information and how to use them.**

Some of the most often referred sources include:

Seminars - There are a wide variety available from government organizations such as the U.S. Department of Commerce, local chambers of commerce, the Small Business Administration. Many universities and community colleges are expanding seminar programs as the interest grows in international business. Specific industry associations often incorporate international programs into their conventions and meetings.

Private companies such as accounting and legal firms and international consultants are sources of excellent seminars on specific topics and focuses. For example, InfoNational has been involved in cosponsoring three seminars and participating in another half dozen in the last year on topics as diverse as getting started in export to doing business in the U.S.S.R. Seminars can be excellent ways to get general information on a wide variety of subjects you encounter in doing business internationally.

To find out about upcoming programs call any of the type of organizations mentioned above and ask for a list of scheduled events.

Periodicals - Magazines, journals, newsletters and newspapers can also be great places to glean general information on international trade and on specific aspects of it. There have been a plethora of publications to crop up in recent years as the global marketplace has become a reality. Some of the standards include the **Journal of Commerce**, a daily trade journal published by Knight Ridder, **Export Today**, a bimonthly magazine by Sirco Publishing, **Global Trade**, a companion magazine to U.S. Custom House Guide, **Business USA**, published by the U.S. Department of Commerce. More recent entries available include **International Business**, a monthly magazine by American International

Publishing Co., World Trade, by World Trade Magazine, Inc.

In addition, numerous companies and organizations publish newsletters and in some cases magazines that focus on international topics in general or specifics of their industry or interest. Accounting and legal firms, freight forwarders and customs brokers, financial institutions, port authorities, trade associations, foreign trade promotion organizations, and a variety of consultants produce targeted publications that supply general information that can be very helpful. InfoNational publishes a periodic newsletter called InfoTrade Report, focusing on practical issues of doing business internationally.

Reference Material - Common reference material can be great sources for information on your specific industry or your specific target market. There are various directories and trade references that can provide answers and direction. A sampling includes:

Texas International Business Directory, published by our company, InfoNational, which gives detailed listings of over 6,000 importers, exporters, service companies, governmental and international support organizations within the State of Texas. You can find other state specific directories in selected states as well.

Official Export Guide, published out of Philadelphia, PA.

Export Information Manual, a project of the U.S. District Export Council's for Texas, Arkansas, Louisiana, New Mexico and Oklahoma.

International Directory of Importers, published by Blytmann International.

United States Importers & Exporters Directory, published by the Journal of Commerce.

American Export Register, by Thomas International Publishing Company.

Directory of Leading U.S. Export Management Companies, by Bergano Book Co.

Export Sales & Marketing Manual, published Export USA Publications.

The Maquiladora Directory, published by Mexico Communications.

Country specific directories found at trade promotion offices and American chambers of commerce abroad.

Industry specific directories often published by industry associations and societies.

The World Is Your Market, a guide for the exporter published by the Small Business Administration.

Online Databases - There are a few international trade oriented online services that are beginning to emerge. They vary in content and cost, but for those who are benefiting from high technology and are willing to become computer literate they can be very helpful. A few to consider are:

InfoTrade Online, provided by InfoNational, Inc., includes a series of databases containing current international trade leads and historical indexes of international traders with interests in specific products and ventures gathered from government and private sources worldwide. It also includes the Texas International Business Directory in a searchable, sortable database.

Network, provided by World Trade Center affiliates around the globe, including those in Houston and San Antonio.

The International Entrepreneurs Network, provided by Compuserve.

Experts and Specialists - Qualified assistance is available no matter what problem or challenge you face in doing business internationally. The help comes in all sizes, shapes and

prices. Some of the most called upon types and sources of trade assist are:

Government agencies involved in trade support - They include organizations such as Texas Department of Commerce, U.S. Department of Commerce, Small Business Administration, local chambers of commerce, trade commissioners of foreign countries, local economic development offices.

Professional private sector counsel and assistance - To avoid costly mistakes, help you get things done more quickly and often times help you maximize profits from international trade you can greatly benefit from professional help. Some of the sources you might need to call upon include:

international legal counsel
international accounting experts
experienced international bankers
qualified customs broker/freight forwarders

You may also want to call upon special consultants that deal with the specific countries in which you have an interest, or those that know and deal with your particular industry internationally.

There are also a growing number of trading companies and trade assistance organizations that help coordinate ongoing trade activity and can function as your "international department" before you may be ready to establish an in-house international staff.

NOTE:

A full list of support organizations can be found in the detailed listings of the Texas International Business Directory.

CAUTION!!!

There are some important things to remember when deciding what type of information and assistance you need and where you will source it.

You can not cut corners and expect to be successful in international business.

Someone will have to do the research and investigation necessary. You can take the time to find it, or learn it, or gain the knowledge through actual experience. You can also call on others to assist you. It is all a question of time and money.

But, if your international opportunity is large enough and real enough the information and answers are out there. And if handled thoroughly and carefully, anybody can profit in the international marketplace.

NOTE:

For a more detailed bibliography of resources contact InfoNational, Inc. at (214) 234-3282 or at P.O. Box 742495 Dallas, TX 75374-2495.

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HOW CAN THE STATE HELP PAY FOR MY EXPORTS?

Eduardo Sosa,
Export Finance Coordinator,
Texas Department of Commerce,
Austin

Commerce's role is to encourage exports as a means of economic development and diversification. Texas consistently ranks among the top three in the U.S. in the export of manufactured goods. Since 1987, we've ranked second only after California. As surprising as these figures are, what is more surprising is that only 20% of Texas firms export. This presents a tremendous window of opportunity to boast exports and thus create new jobs. In 1989, the comptroller's office estimates that Texas gained over 95,000 jobs principally due to exports.

At present, the Export Finance Office has four services available to assist Texas exporters. Today we will discuss each in different degrees of detail. Please stop me at any time should you have a question. Additionally, most of this material is included in the packet of information provided.

TELF is really a misnomer. The fund is strictly for guarantees, not for direct loans. TELF is a $2,000,000.00 fund set aside in the state treasury to guarantee up to 85% of a working capital loan made by a lender to a qualified exporter. The fund became available on 9-1-89, and can guaranty a minimum amount of $10,000.00 and a maximum of $350,000.00. This maximum is to any one borrower at any one time. In other words, total cumulative guarantees cannot be in excess of $350,000.00. Should the borrower pay off the loan, he becomes eligible for additional lending.

There are certain requirements for the exporter, lender, product and costs to be eligible under TELF.

EXPORTER

The business must be entering or expanding into the export market. The business must also be financially responsible in order to assume the obligation. In other words, it must have a track record of paying its debts. Like any other lender, we look for a reasonable assurance of payment. Also, the business must be reasonably able to produce/deliver the product.

The owner must have a reasonable equity in his business. Commerce and the lender will determine this on a case by case basis. Negative net worth will probably not qualify for the program. However, a break-even net worth may be considered. Even if you should have a negative net worth, we would still like to visit with you. In some instances we may be able to apply "accounting wizardry" and help you qualify.

The potential exporter must be able to provide a minimum of 10% of the project cost. We look to finance only the cost to produce/deliver under a contract. Consequently, the injection is based on the project cost. For example, if your contract calls for a price of $100,000.00 but it will only cost you $60,000.00 to produce/deliver; you will only be required to inject $6,000.00, 10% of the project cost. The injection may be in cash, equity in real estate or depreciable property.

LENDER

The lender must also be financially stable. All lenders are required to submit sufficient financial information so we can determine their viability. Typically, we will review the financial data and check the lender's rating as stated by a recognized rating agency.

The lender must be a lending or governmental agency customarily providing financing. They must have the ability to monitor the credit.

Finally, the lender must remain at risk for at least 10% of the loan.

Our guaranty is "up to" only. If we decide to do less, the lender has the option of "laying off" part of his risk, if he so desires, but must retain 10%. A question that has come up lately is whether we would allow any additional collateral to cover this 10% portion. No we would not. If we were to do so, the lender would, at that point, have zero risk.

Any lender may qualify for this program. Banks, credit unions, S&Ls, cities and finance companies can all qualify if they meet the financial, monitoring and risk criteria.

PRODUCT

In order to qualify under this program, a manufactured good or service must have at least 25% of its total value represented by Texas source components, labor or intellectual property. The best way to understand this requirement is through an example. If you are exporting automobiles, you would not qualify since no manufacturing facility exists in Texas for autos. However, if you are buying wrecks, repairing them, and then selling them overseas, you may qualify if the Texas labor component is 25% of the total cost of the auto. Intellectual property refers to any architectural and/or engineering type work performed.

The export or pre-export preparation of a Texas agricultural product or livestock also qualifies.

COSTS

Generally speaking, raw materials, inventory, labor, overhead, marketing costs and equipment may all be paid for through this program. However, since our loan term is for one year or less, the equipment realistically will need to be for low dollars, or you must be very profitable in order to meet this requirement. The accommodation may be in the form of a line of credit. Guidelines for funding will be preset, and as long as the lender follows them, the guarantee will remain in effect.

The program rules state that the loan must be secured by "appropriate collateral". At Commerce, we interpret this to mean that we will take as collateral that which we are financing. That is to say, that if we are financing inventory which upon sale become receivables, we will take both the inventory and receivables as collateral. The significance to this is that any domestic relationship that the exporter has with his bank will not be disturbed. Additionally, this treatment allows an expansion of his market by using products for that market to finance the operation. Typically, collateral coverage of 110% is required. However, in some instances, if the lender is willing to take less coverage we are able to do so. In most instances, we are dealing with small to medium sized, closely held companies. The owners of these companies will typically be required to guaranty the loan.

NOTE - Commerce and/or the lender may require the exporter to obtain political and commercial risk insurance from FCIA or a private insurer on the receivables. Three factors determine if the insurance would be required, (1) product being sold, (2) country of sale and (3) terms of sale. If the exporter was selling fresh vegetables to Nigeria on an open account basis, insurance would definitively be required.

Certain costs are applicable to this guarantee. A $100.00 non-refundable application fee is submitted with the application. The lender is charged a 1% fee on the guarantee amount. The application fee can be credited against guarantee fee. Realistically, the guarantee can, and usually will be, passed on to the exporter. Additionally, the guarantee fee is refundable if the loan is not funded and the guarantee instruments are returned, canceled, to Commerce.

There are many benefits to the exporter and the lender under this program. As stated before, the exporter is provided a new source of funding through the use of the export assets. This new funding source in turn facilitates his entry into a new market. Quoting Dr. John Adams, SBA Exporter of the Year in 1988, "if a company is not exporting, they are missing 20 to 40% of their market". Lastly, our application requires a minimum amount of paperwork.

The application was designed as if the exporter was coming to Commerce direct - which they can do. However, we strongly advise that they approach us only after they have a banker committed to the transaction. The application consists of only 4 pages. The first few pages of this package are simply an explanation of the program as described here today. The next page is a one half page certification that you are telling us the whole truth and nothing but the truth. Finally, the last page is simply a check list of items that should be provided to enable the proper and timely decision to be made. The lender also must complete a half page certification that he has performed his due diligence as he would on any other loan. The next page on his application is also a checklist. One of the items we require of the lender is the package he presented to his loan committee. In this package the lender will typically have reviewed all items we request on the exporters checklist. Consequently, by going to the lender first, a significant amount of time can be saved during our own review process, which in turn means the exporter can complete his sale on a more timely basis.

The lender also benefits. This program provides an excellent new service for him to provide for existing good clients. Those clients he knows export but he had been unwilling to finance because of the foreign risk. Also, this makes an excellent business development tool by offering international financing, yet limiting his risk. The no interest limitations; the ability to charge fees; and the short term nature of the loan further enhance the value of this program. Finally, they also have significantly reduced paperwork to deal with. Only one governmental form is required. All of the other information is what they normally generate in their due diligence process. This program's emphasis is on content of information, not on "forms".

Accessing the program can be relatively simple. Ten Export Finance Satellite Centers are available around the state to assist the exporter and lender in the preparation of the application. Centers are located in:

Austin
Abilene
Amarillo
Corpus Christi
Dallas/Ft. Worth
El Paso
Houston
Laredo
Longview
San Antonio
San Angelo
Odessa
Kingsville
Edinburg

The exporter is expected to establish his market first. Assistance is available from some Satellite Centers and also from the Commerce's office of International Trade. He should then contact his lender, complete the application, and then submit it along with the fee.

The lender then performs his due diligence. He completes the application with the appropriate documentation and submits it to Commerce. Once approved, the lender should execute the guaranty agreement and related documents. The process time is dependant on the completeness of the package submitted. The first loan we received was on 1-2; by 1-19 we had granted approval. The next loan was completed in two weeks. Both loans had a commitment from the lender, We anticipate at maximum of 30 days to respond, but we usually do better.

Some examples of transactions approved thus far are:

An $80,000 sale to the Republic of the China. Request was for an 85% guaranty of a $50,000, 90 days loan. The bank charged 3% over their bank's prime. As collateral we took the personal guarantees and inventory. We also took an assignment of a letter of credit. Most of you probably feel that by having a l/c we have no risk. Wrong! No lender looks upon a l/c as collateral. The l/c is simply the glue that keeps the deal together. Why? A l/c is performance dependant. That is, payment will not

be made unless the beneficiary performs as contracted and can generate documents acceptable under the l/c. Performance then becomes the big question. Because the company had over 65 years experience in their business, we felt the exporter would be able to complete the contract. However, this was only the second export transaction for the exporter and the previous sale had been seven years prior. Consequently, the committee required the use of an experienced freight forwarder to generate the documents for presentation under the l/c. The cost for this service is estimated at $150.00. Payment should be made within 7 days. In our opinion, this is a reasonable cost to insure fast payment. Additionally, should non-payment be caused by an error in documentation by the forwarder, they have errors and omissions policies which would pay the exporter.

The International Freight Forwarder

by Delbert R. Henry
Vice President, Sales
The I.C.E. Co., Inc
Tel: (817) 481-6565
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It has been my pleasure to present the role of the international forwarder at export seminars across the state of Texas. Taking part in these seminars is our way to give back a part of our success to the international community. I trust that our effort has provided motivation to the non-exporting manufacturers and has introduced the export process that leads to sales and prompt collection of funds.

Exporting should be as easy as shipping from Texas to New Mexico. There is a sequence of events that must occur in specific order to complete the transaction and to satisfy both buyer and seller. It is this sequence, or process, that I wish to address:

1). The International Freight Forwarder

2). The pro-forma invoice

3). The letter of Credit

4). The Packaging of the product

5). The export of the product

6). The presentation of required documents

7). Duty Drawback

The Freight Forwarder

The success or failure of the attempt to enter the international marketplace depends not only on the product itself, but also on the international freight forwarder that choose. Your forwarder should be both International Air Transport Association (IATA) agents and Federal Maritime Commission (FMC) licensed forwarders. It may also help the situation if the forwarder is also a Custom Broker. The I.C.E. Co., Inc. is all three, IATA/FMC forwarder and Customs Broker.

The Pro Forma Invoice

After receiving an invitation to quote, from a foreign buyer, the exporters first step in the process is to contact the forwarder. The forwarder should know that you are new to the export process and wish assistance and guidance. The forwarder will ask many questions and must receive accurate answers to provide you with the costs to be included on your quote. First, we must know the terms of sale which are known as Incoterms. FOB, FAS, C&F and CIF are the most common terms and dictate specific responsibilities for the buyer and the seller. I.C.E. will be happy to mail you a copy of the Incoterms if you will call (817) 481-6565. We must know if the shipment is to move by air or ocean, what the export commodity is, the weight and measurments of the cartons or crates and the value of the shipment. We will also ask if the product contains any imported parts. If your product contains products that have been imported, there is a chance that you may drawback up to 99% of the duty paid when it was imported. The forwarder will advise the costs you are responsible for according to the terms of sale. Under a C.I.F. quote the forwarder will provide the following costs:

1). Inland Freight

2). Forwarders Fee

3). U.S. port or airport costs

4). Loading and wharfage

5). Ocean or air freight

6). Cargo Insurance

7). Harbor maintenance fee (paid to U.S. Custom)

The above costs, added to the cost of the product, will constitute the C.I.F. cost to the potential importer. The entire cost breakdown should be shown in the pro forma invoice and it should contain all of the information needed by the importer to make a decision. We, the forwarder, will be happy to assist in the creation of a professional pro forma invoice.

After listing the CIF costs the exporter should show the terms of sale, method of payment, lead time requirements, and last but not least, a statement advising the potential customer that you reserve the right to use your own forwarder to protect your interests in the preparation of documents to meet the requirements of the letter of credit. You should not allow an unknown forwarder, specified by the buyer, to prepare documentation that will get payment to you for goods you have shipped. It is your right, under the Incoterms, to use the forwarder of your choice. After all, it is your money.

The Letter of Credit (L/C)

If your potential customer accepts your quote, he will take the pro forma invoice to his bank and open a letter of credit to you. His bank will transmit the letter to your bank and your bank will advise you. Before starting production or buying the products you should fax a copy of the L/C to us. We will pull the quote we made for the pro forma invoice to assure that nothing has changed. If everything is still the same, we will advise you that everything is acceptable, that you can meet the requirements and ask when the shipment will be ready.

Packaging

Packaging is very important in international shipping. Shipments by air normally do not require the protective packaging the shipping by an ocean carrier does. However, thought must be given to the facilities at destination. Many countries do not have warehouses or sheds to protect the product from the environment.

Air and Ocean carriers charge by weight or measure. Therefore, your product and your packing should have little or no dead air space. For example, a carton measuring 12'x18'x24 and weighing 20 pounds will be charged as 31 pounds by the air carrier. They arrive at the weight by dividing the cubic inches by the factor 166. The ocean carrier charges by actual weight or by cubic meter, whichever provides the greatest revenue for the carrier.

It may be a good idea to have your forwarder look at your product and the packing, to determine if changes need be made to lower the transportation costs. Remember, the transportation cost may lower your competitive stance and vice versa.

The Export of Your Product

You advised the forwarder that your shipment would be ready on a certain date. The forwarder "booked" the space on a particular vessel or aircraft, scheduled to depart on a date that meets the requirements of the L/C. The forwarder arranges for shipment from you to the port or airport. We also send a dock order to the oceanport if the shipment is by ocean carrier. We pay the ocean port charges, the harbor maintenance fees to get your shipment on board (over-the -rail) and secure the documents necessary to meet the L/C requirements. These documents may be the commercial invoice, packing slip, certificate of origin, consular documents, bills of lading and various insurance certificates, statements, etc. After all the documents have been obtained and the appropriate number of copies made, the documents package is mailed to your bank. The bank verifies the documents and sends them to the foreign bank along with a draft to draw the funds for you.

The Cargo Insurance

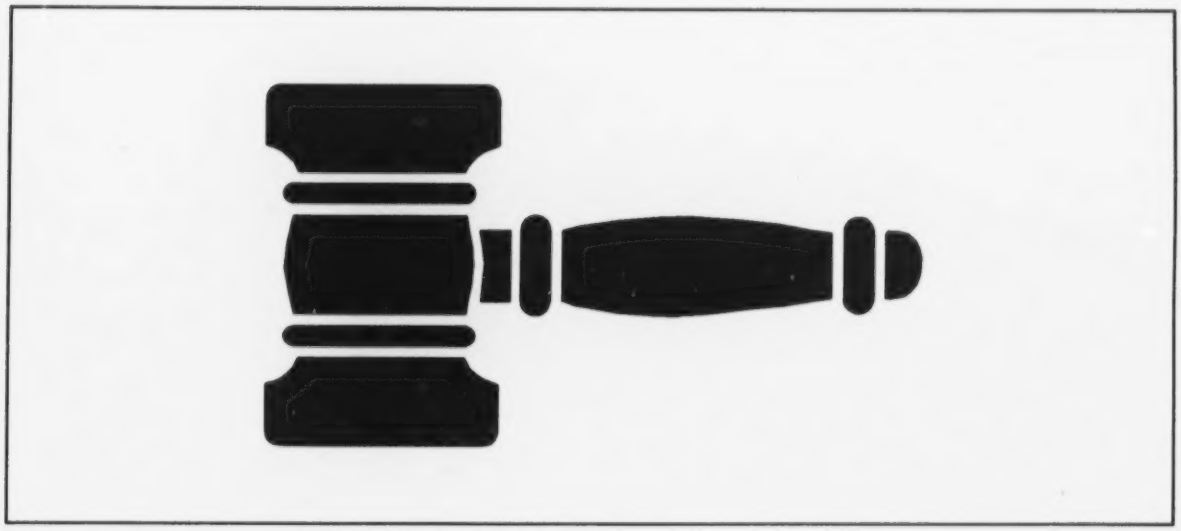
If you are providing the cargo insurance on a C.I.F. shipment it will be for 110% of the C.I.F. amount. We normally recommend all-risks coverage , door-to-door. There are many potential problems when not covering the shipment with all-risk insurance. We can explain these risks to you if you will call us.

The Harbor Maintenance Fee

This fee was added to the cost of importing or exporting by ocean carriers. It is paid to U.S. Customs who in turn pass it to the respective ocean ports for maintenance of the ports. At this writing the HMF is .04% of the invoice value.

Drawback

Drawback of up to 99% of the duties paid on imported products may be available to you the exporter. Over 3 billion dollars goes uncollected each year by exporters. If you have imported products put into your export product, you should communicate with your forwarder about draw back. It may be that a product you purchase is imported and with an assist from the actual importer you can benefit all or a portion of the duty. This could provide more profit or improved costs to your foreign buyer. I apologize if I have made the international sale seem complicated. Most of the complications are for the forwarder, not the exporter. We do this everyday and it is uncomplicated to us. Let your forwarder worry about this and you worry about making the sale and having the products ready for shipment. Consider us, the international forwarder, as an extension of your international department. Lets communicate and when necessary lets push each other to meet the time requirements set forth in the L/C. Together we can both profit by clean, worry free shipping in the international marketplace.



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WHEN AND WHY DO I NEED LEGAL ADVICE TO EXPORT?

I. Plan Now, Avoid Problems Later

- A. International Business is Different
- B. Learn the Rules of the Game
- C. Time and Cost Considerations

II. Do I Need a Written Agreement?

- A. Distributors and Sales Representatives
- B. Model Provisions
- C. Termination and Dealer Legislation

III. Getting Paid

- A. Exchange Controls
- B. Payment Methods (Open account, letters of credit)
- C. Withholding Taxes
- D. Overinvoicing
- E. Security Interests

IV. Proprietary Rights

- A. Trademarks
- B. Patents, Trade Secrets and Know-How

V. What Else Should You Consider?

- A. U.S. Export Controls
- B. Foreign Corrupt Practices Act
- C. Place of Payment of Commissions
- D. Antiboycott Rules
- E. Product Liability and Warranties
- F. Use of DISC or FSC
- G. U.N. Convention on Contracts for the International Sale of Goods

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EXPORTING THROUGH INTERNATIONAL DISTRIBUTORS AND SALES REPRESENTATIVES

I. Introduction

Using a distributor or sales representative is usually the easiest method through which a manufacturer can export and enter the foreign marketplace. Such an arrangement gives the manufacturer an immediate sales force in a new market without having to make a fixed investment or hire employees. The general concept of appointing a distributor or representative in a foreign country is the same as appointing a U.S. distributor or representative; however, the manufacturer should be aware that the laws and business practices that will apply in a foreign country can be vastly different. Some advance information and planning, and a properly worded distribution or representative agreement can avoid numerous problems and lost time and money.

In some countries the distinction between distributors and representatives is not as great as in others. In other countries there are additional types of marketing arrangements besides the usual concept of distributors and representatives. (The term "dealer" is often used to designate distributors, sales representatives and any other type of marketing entity.) In addition, each distributor or representative relationship will have its own unique aspects, based upon the industry or country involved and the preferences of the parties. Nevertheless, most marketing relationships between a manufacturer and an independent marketing entity can be classified either as a distributor or sales representative relationship having certain general characteristics.

A distributor usually:

(a) buys and sells for its own account and is compensated by the markup it charges on the goods it sells;

(b) bears the economic risk of sales and carries customers' credit; and

(c) warehouses and physically distributes the goods.

On the other hand, a sales representative usually:

(a) does not buy or sell for its own account but rather is compensated by a commission based on the manufacturer's sales;

(b) does not bear the economic risk of failure of payment; and

(c) does not warehouse or physically distribute the goods but instead solicits orders for shipment directly to the customer from the manufacturer.

One major similarity, however, is that neither the distributor nor the sales representative has the power to bind the manufacturer.

II. Key Issues

The following are key issues and dangers that commonly arise in establishing a relationship with a distributor or sales representative in a foreign country.

1. Dealer Legislation; Termination.

Certain countries have adopted legislation protecting distributors and/or sales representatives operating in their territory. Such legislation typically prohibits termination of the dealer except for "cause" (as defined in the legislation) and/or after a specified notice period, and requires payment of indemnification for unjust termination (and sometimes for any termination). The provisions of the distributor or representative agreement regarding termination of the relationship are important items, and therefore the requirements of any

dealer legislation should be considered carefully. Sales representatives are more often the subject of the protection of such statutes, because sales representatives usually are more dependent upon a relationship with one manufacturer or a small group of manufacturers. Furthermore, there is a greater danger that the manufacturer would seek to terminate this type of relationship "unfairly" after the representative has built up the market, because the manufacturer ships directly to the customers and therefore has the customer list.

It is important for a manufacturer to find out whether the country where it proposes to appoint a distributor or representative has dealer legislation, and what the terms of the legislation specify. It is often possible to avoid some of the undesirable effects of such legislation with a properly worded agreement. Even if the legislation cannot be avoided, it is important to take it into account in determining the risks and costs associated in appointing a distributor of representative in the country being considered.

Included in the materials is an excerpt from our firm memorandum on dealer legislation in Latin America, which gives an example of the types of issues involved in such legislation. We have such information on the major countries of the world. The U.S. Department of Commerce also has such information, and it is available from other sources as well.

2. **Payment; Foreign Exchange Regulations.** Many countries of the world, especially poorer or heavily indebted countries, control closely the amount of dollars that are available to local companies to pay for imports. In such countries, certain approvals or licenses for the import of the goods and the remittance of dollars will be required, and significant delays may be involved in obtaining such approvals. Sometimes the U.S. manufacturer will be required to provide certain financing terms to the foreign importer. The U.S. manufacturer will want to learn of such foreign exchange restrictions in setting up the distributorship or representative relationship, and before setting its production plans or shipping any goods.

3. **Intellectual Property Rights.** If the U.S. manufacturer's products are patented or subject to copyright, it is extremely important for it to learn whether patent or copyright protection is available in the country to which it proposes to ship its products. Marketing the products in a country where such protection is not available not only creates a greater risk of pirating of the product, but may constitute a disclosure or publication that might jeopardize the manufacturer's ability to obtain or maintain a patent or copyright for the product in other countries.

Likewise, a U.S. manufacturer should be sure to register as soon as possible in a country where it proposes to sell its products any trademarks under which the products will be sold.

The laws of a great number of countries specify that the owner of a trademark is the first person to register it, not the first person to use it in marketing its products (as in the U.S.). In many countries, such as Japan, it is common for a company to register its foreign competitor's trademarks so that the competitor will not be able to compete as effectively in that country. It is also a common practice for a distributor or representative to register its foreign principal's trademarks, which can make termination of the distributor or representative much more difficult. The distributor or representative agreement should prohibit such an action.

In general, if a manufacturer intends to market its products abroad, it should act as quickly as possible to register (if possible) or otherwise protect its patents, copyrights and trademarks at least in the key countries in which it will market.

In addition, appropriate provisions should be included in any distributor or representative agreement entered into which specify that the distributor or representative obtains no rights in the manufacturer's patents, copyrights or trademarks, and agrees to assist the manufacturer in protecting against infringement by third parties. There is often confusion about what rights should be given to a distributor or representative in the manufacturer's intellectual property rights. As a general rule, rarely is it necessary to grant a license in such rights to a distributor or representative.

Again, a law firm dealing in international matters such as ours and the U.S. Department of Commerce have information on the intellectual property rights laws of the various countries of the world.

4. Trade Secrets.
Unlike protection of patent, copyright and trademark rights, protection of trade secrets is usually handled solely through contractual provisions. Where such trade secrets are involved, appropriate provisions should be included in the distributor and representative agreement prohibiting the unauthorized use or disclosure of the trade secrets during the term of the agreement and at any time thereafter. A common mistake is to put a time limit on the nonuse and nondisclosure obligation; the obligation should remain in force for as long as the trade secrets continue to be confidential, proprietary information of the manufacturer and not disclosed to the public (other than by the distributor or representative).

Note, however, that in many countries of the world, injunctive relief from the courts is not available to prohibit a distributor or representative from violating a nonuse or nondisclosure provision. Rather, only a suit for monetary damages is allowed, and it is often extremely difficult to prove the damages caused. One response to this problem is to include a substantial penalty clause in the agreement for violation of the prohibition against use or disclosure of the trade secrets. There may also be practical measures that the manufacturer can take (such as withholding key parts of its trade secrets without which the rest of the secrets are useless) to try to prevent unauthorized use or disclosure.

5. Registration Requirements.
For some products or industries, or if the foreign manufacturer will be supplying technical information or services under the agreement, a foreign country may require that the distributor or representative agreement be approved and registered by the government. For example, in many lesser developed countries, agreements involving the marketing of software must be approved and registered with the country's transfer of technology authority. Typically, such laws will require certain provisions to be contained in the agreement, and will prohibit other clauses from being included in the agreement before it will be approved and registered. Failure to have the agreement registered usually means that it will not be possible to obtain dollars for payments for the products sold, and/or the payor would not be able to deduct the payments for local income tax purposes, and the agreement (including its provisions protecting trade secrets and other proprietary rights) would not be enforceable in the country. Thus, it is extremely important to determine whether such a law is applicable, and the effect of the law on the provisions of the agreement and perhaps on the structuring of the relationship with the foreign party.

6. Foreign Corrupt Practices Act.
The U.S. Foreign Corrupt Practices Act ("FCPA") is a complex and ambiguous statute that has received much criticism (and in fact certain of the most troublesome aspects of the FCPA were recently amended in 1988). Nevertheless, the basic prohibition of the FCPA is clear: a U.S. individual or company may not pay a bribe to a foreign government official or political party or candidate in order to obtain or retain business. To do so is a crime punishable by fines and imprisonment.

In addition, such a payment may not be deducted for purposes of computing U.S. income tax liability, and an improper deduction in a tax return could be considered a violation of the criminal statute prohibiting the submission of false statements to the government. Depending upon the circumstances, other statutes might also be violated. Note that a "commercial" bribe made to an officer of a private company and not to a government official is not a violation of the FCPA. However, some companies also prohibit such bribes as a matter of company policy, and such bribes may violate foreign law, as discussed below.

One of the troublesome aspects of the FCPA is that bribes made by a foreign sales representative can be considered to be made on behalf of the U.S. manufacturer in violation of the FCPA if the manufacturer knew that a bribe would be paid, or was guilty of conduct "which evidences a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act." Thus a manufacturer may not simply ignore the problem. The representative agreement should normally contain a clause prohibiting payments by the representative to foreign government officials that would violate the FCPA (at least if the products are likely to be sold to a foreign government or government agency). In addition, a manufacturer should take added precautions or obtain additional assurances from the representative that such a bribe will not be paid if the manufacturer is aware that the representative has a special relationship with a government official or if the commission requested is higher than the going rate. This is a complex and dangerous area, and it is advisable to consult with an attorney if a questionable situation arises.

The FCPA is usually not a concern in the case of a distributor agreement, because the manufacturer typically does not make payments to the distributor which could be used for a bribe. However, if a manufacturer gave an unusual discount to a distributor with the knowledge that the excess money would be used to make a bribe, then a violation of the FCPA could occur.

7. Foreign Commercial Bribery Statutes.

In considering whether certain conduct is a violation of the FCPA, it is also important to consider whether there has been a violation of foreign law. As a general rule, many foreign countries have provisions in their civil, commercial or criminal codes which prohibit or punish acts of commercial bribery. The applicable penalties often include civil fines and imprisonment, and can be imposed against both wrongdoers and aiders and abettors.

8. Overinvoicing and Underinvoicing.

A scheme which is commonly encountered in export sales is "overinvoicing." Briefly stated, this occurs when a commercial invoice states a sales price which is higher than the actual or true sales price. Overinvoicing typically is used to assist a sales representative or distributor to accumulate foreign currency outside of its country (especially where exchange controls are in force) or to avoid payment of local income taxes. Overinvoicing schemes are often touted as a means of doing business or justified because it is the only way to maintain a relationship with a productive sales representative or distributor. In many foreign countries this type of scheme is illegal (e.g., issuance of a false document, violation of exchange controls, aiding and abetting income tax evasion).

"Underinvoicing" presents similar problems. This is typically used in order to lower the value of goods subject to customs duties or other import charges in a foreign country.

Again, this type of scheme is usually illegal (e.g., issuance of false document, violation of customs regulations).

It is advisable to be wary and seek legal assistance whenever an overinvoicing or underinvoicing scheme is proposed by a foreign distributor, representative or customer.

9. Payments to Sales Representatives.

It is not uncommon for a foreign sales representative to request that its commission be paid to an account outside of its country. It is advisable to determine whether this would constitute a violation of local exchange control laws or be considered an act of aiding and abetting local tax evasion by the sales representative. When in doubt, it is advisable to consider paying any commissions directly to the sales representative in its country.

10. Tax and Duty Issues.

The income taxes, sales taxes, value added taxes, import taxes, customs duties and other taxes and charges applicable may be affected by whether a distributor or sales representative relationship is used and other aspects of the arrangement. This is particularly true for products such as software, for which the U.S. manufacturer is being paid license fees rather than a purchase price. In addition, note that it is usually better to appoint a corporate entity rather than an individual as a sales representative, because under the laws of some countries the appointment of an individual could constitute an employment situation, and the U.S. manufacturer would be considered doing business in the foreign country and subject to taxation there on the profits from its sales. These issues should be considered in planning the marketing arrangement, and to the extent necessary, the obligations of the parties to pay the taxes and other charges involved should be addressed in the agreement.

III. Other Export Sales Issues

In addition to the foregoing issues, the distributor or sales representative arrangement will also involve the usual considerations affecting export sales from the U.S. It is not possible to address all of these issues in the time allowed. For your reference, however, the following are some of the major issues:

- U.S. Export Controls
- Foreign Import Controls and Quotas
- Foreign Industry Standards
- Product Liability and Warranty
- Antiboycott Rules
- Use of DISC or FSC
- Governing Law (UN Convention)

IV. Contract Provision

Set forth below are suggested provisions to be considered when drafting distributor and sales representative agreements. Not all of these provisions, however, may be relevant for each such agreement, nor should this outline be considered exhaustive. Although each distributor and sales representative agreement should be drafted to address the specific arrangement, the provisions below should provide a good outline.

1. Parties

Include full name, address, and jurisdiction of organization and form of organization (if an entity) for the following parties:

a) Manufacturer;

b) Distributor/Sales Representative; and

c) Guarantor - may be desirable if distributor is closely held and payment is not by letters of credit.

2. Definitions

a) "Products" - define as fully as possible, on a schedule, if appropriate; address whether it includes improvements, new products, or new product lines; manufacturer should reserve right to modify or discontinue products.

b) "Territory" - define clearly; generally list countries instead of international organizations that may change (e.g., EC) or terms that are subject to interpretations (e.g., Europe).

3. **Appointment**

	Distributor	**Sales Representative**
a)	Distributor is appointed and accepts	a) Sales representative is appointed and accepts.
b)	State whether distributor is exclusive or non-exclusive (may have antitrust implications).	b) State whether sales representative is exclusive or non-exclusive (may have antitrust implications).
	i) Define Exclusivity as simply not appointing another distributor for the Territory; address whether manufacturer may sell directly to customers in the Territory, and if so , whether distributor receives a sales commission for such sales. Do not attempt to prohibit shipments by other distributors or customers into the Territory (parallel imports); in EC and U.S, this is generally an antitrust violation.	i) Define Exclusivity as simply not appointing another sales representative for the Territory; address whether manufacturer may sell directly to customers in the Territory other than those presented by sales representative and if so, whether sales representative is entitled to (lesser) commission for such sales. Do not attempt to prohibit shipments by distributors or customers into the Territory (parallel imports); in EC and U.S. this is generally an antitrust violation.
	ii) Qualifications to Exclusivity -Right of manufacturer to sell to U.S. government and agencies -Right to sell to multinational enterprises who take delivery outside the Territory but ship Products into Territory as a separate component, sub-assembly, or part of a complete product.	ii) Qualifications to Exclusivity -Right of manufacturer to sell to U.S. Government and agencies -Right to sell to multinational enterprises who take delivery outside the Territory but ship Products into Territory as a separate component, sub-assembly, or part of a complete product.

c) Define relationship as that of buyer and seller; distributor is not an agent or representative of manufacturer.	c) Define relationship as that of independent order solicitor; sales representative is not an agent or representative of manufacturer.
d) Manufacturer may change or discontinue any and all models of products and is under no obligation to stay in business or that particular line of business.	d) Manufacturer may change or discontinue any and all models of products and is under no obligation to stay in business or that particular line of business.

4. Terms of Sale/Order Acceptance

Distributor	Sales Representative
a) Orders are subject to acceptance by manufacturer, which may refuse or modify orders; if manufacturer is required to ship promptly, then state that manufacturer need not ship if distributor is late in payment.	a) Orders are subject to acceptance by manufacturer, which may refuse of modify orders; sales representative merely solicits orders and forwards them to manufacturer.

b)	Define price at a stated point in geography; describe discount terms, if any; reserve manufacturer's right to change prices, and upon how much notice, with no need to accept unusually large orders during the notice period; state that distributor pays freight, customs duties and taxes outside U.S.	b)	Describe how price lists, discounts, etc., are to be used and modified.
c)	Define payment terms (e.g., letter of credit, sight draft, deposit, open account, currency).	c)	Address whether sales representative will assist in, or assume liability for, collections on behalf of manufacturer
d)	If sales are on a open account or other delayed payment method, add a penalty for late payment (e.g., 1% interest per month) and state that if distributor is in arrears all future shipments will be on a C.O.D. basis.		
e)	No deductions by distributors; set-offs permitted by manufacturer.		
f)	Security interest or similar procedure.		
g)	In case of large capital goods define point of delivery (e.g., port of exit), when passage of title and risk of loss passes (may have tax implications), and who arranges shipment; if shipment is to congested ports have manufactuer's obligations discharged by delivery of goods to dock in U.S. (See "INCOTERMS" and U.C.C.)		

5. Sales Obligation

	Distributor	Sales Representative
a)	Best efforts to promote and sell the products:	a) Best efforts to promote sales of and solicit orders for the products; sales representative responsible for expenses.
	i) describe required activities (e.g., attend certain trade shows)	i) describe required activities (e.g., attend certain trade shows)
b)	Address whether distributor will be selling the products on a full-time basis (i.e., no other products).	b) Address whether sales representative will be soliciting orders for the products on a full-time basis (I.e., no other products).
c)	Minimum sales requirements (initial purchases and increases), if any, and penalty of non-exclusivity or termination.	c) Minimum sales requirements (and increases), if any, and penalty of non-exclusivity or termination.
d)	No sale of competing products and penalty of non-exclusivity or termination. (May have antitrust implications.)	d) No sale of competing products and penalty of non-exclusivity or termination. (May have antitrust implications.)
e)	Distributor's installation, repair and service obligation, if any.	e) Sales representative's installation, repair and service obligations, if any; manufacturer's warranty; no authority to accept returns or make allowances.
f)	Distributor to give same warranty as manufacturer; manufacturer not responsible for any broader or additional warranties.	f) Sales representative to give no warranties.
g)	Address who pays advertising and promotion and how much; require prior approval of sales literature by manufacturer; address whether manufacturer will supply sales literature and advertising material; responsibility for mailing lists.	g) Address who pays advertising and promotion and how much; require prior approval of sales literature by manufacturer; address whether manufacturer will supply sales literature and advertising material; responsibility for mailing lists.
h)	Distributor's obligation, if any, to maintain suitable place of business.	h) Sales representative's obligation, if any, to display products appropriately.

i) Maintenance of an adequate supply of the Products in inventory.

j) Distributor to sell to all customers without discrimination. (May have antitrust or antiboycott implications.)

k) Distributor's obligation, if any, to display products appropriately.

- end of section 5 -

i) Sales representative's obligation, if any, to maintain a suitable place of business

- end of section 5 -

6. Compensation - Sales Representative Only

a) Commission

i) percentage of sales (net of freight, customs duties, taxes, etc.);

ii) will percentage increase or decrease with sales;

iii) when is commission payable (e.g., quarterly within 30 days after end of quarter);

iv) on what is commission payable (e.g., all sales orders solicited by sales representative, all sales into the Territory); and

v) how are refunds or returns to affect commission.

b) Flat fee

i) may be appropriate, e.g., during first year of exclusive agreement for new Products.

c) Combination

i) produces some minimum compensation protection for sales representative while still providing incentive for sales increases.

d) Local law (e.g., exchange controls) may determine how commissions will be paid.

7. Reporting of Information by Distributor/Sales Representative

a) Reports on sales by model and prices (distributor only).

b) Supply list of customers (distributor only).

c) Reports on customer credit worthiness (usually, sales representative only).

d) Reports on distributor/sales representative's financial condition (usually distributor only).

e) Reports on competitive products and competitor's activities.

f) Advice on government regulations affecting import and sale of the Products (e.g. consumer product safety and labeling standards).

g) Right of manufacturer to inspect premises, obtain full information on other lines being carried (they may be competitive) and inspect books.

8. Technical Assistance by Manufacturer

a) Supply of personnel to train distributor/sales representative in sales and service, if applicable.

b) Training of Distributor /sales representative's personnel in manufacturer's home country.

c) Manufacturer to supply design and assembly information, if appropriate. (Perhaps, under separate agreement.)

d) Distributor/sales representative to keep all information confidential for the term of the agreement and thereafter.

9. Trademarks, Patents, Copyright

a) Distributor/sales representative acknowledges manufacturer's ownership of all corporate, trade and business names, trademarks and copyrights and agrees not to contest the same. (No contest clause may have antitrust implications, e.g., in EC.)

b) Distributor/sales representative agrees not to register any corporate, trade or business name, trademark or copyright, including any name, mark or copyright used by manufacturer anywhere with respect to its products and agrees to assign the same to manufacturer on demand if the same are registered.

c) Manufacturer provides no warranty against infringement (except perhaps U.S., not foreign, trademark, copyright or patent rights)

i) address who is responsible for bringing local infringement actions.

10. Term and Termination

a) Fixed term (termination indemnity may apply)

i) automatic renewal for successive terms, absent notice of non-renewal;

ii) after fixed term, indefinite term with appropriate notice period; or

iii) after fixed term, expiration unless parties agree to new arrangement.

b) Indefinite term with appropriate notice period (termination indemnity may apply)

i) generally, does not provide adequate incentive for distributor/sales representative to incur sales promotion and other expenses.

c) Termination for cause

i) breach of agreement not remedied within 30 days of written notice;

ii) inability of distributor/sales representative to pay debts as they fall due or commencement of any proceedings by creditors to enforce their rights;

iii) change of ownership or control of distributor/sales representative;

iv) death or disability of chief executive officer or other key

management of distributor/sales representative; or

v) expiration or termination of any other agreement between manufacturer and distributor/sales representative.

11. After Expiration or Termination

a) Option of manufacturer to repurchase inventory of products (distributor only).

b) No expiration or termination compensation.

c) Distributor/sales representative to

i) cease using manufacturer's corporate, trade and business names, trademarks and copyrights or any name, mark, or copyright confusingly similar to those of manufacturer,

ii) remove telephone, trade and other listings indicating identification with manufacturer or authorization to act as a distributor/sales representative, and

iii) return all promotional, advertising and other literature relating to manufacturer or products.

d) Limitation on competition within a defined area for a reasonable period of time.

12. Disputes and Governing Law

a) English language governs notwithstanding any translation.

b) Governing law

i) U.S. state of manufacturer; and

ii) applicability, if any, of U.N. Convention on Contracts for the International Sale of Goods.

c) Jurisdiction and Venue

i) arbitration

- rules (e.g., AAA, ICC, UNCITRAL);
- body (e.g., AAA, ICC);
- number of arbitrators (typically, 1 or 3);
- place;
- language;
- provide exception to allow suits by manufacturer to enforce confidentiality and intellectual property rights obligations or

ii) courts (U.S. or foreign)

-submit to jurisdiction (exclusive or concurrent)

13. Miscellaneous

a) Agreement supersedes all prior agreements.

b) Agreement may be amended only in writing.

c) Terms of agreement govern all sales between the parties notwithstanding conflicting terms in invoices, order acceptance forms and related documentation (distributor only).

d) Agreement is not assignable or delegable.

e) Distributor/sales representative is not authorized to appoint sub-distributor/sales representative or permit others to indicate they have rights as distributors/sales representatives without manufacturer's prior written consent.

f) Distributor/sales representative is not an agent and has no power to bind manufacturer.

g) Distributor/sales representative to indemnify manufacturer for acts or omissions of distributor/sales representative and its employees and agents.

h) Exclude incidental and consequential damages.

i) Agreement is separable (except for jurisdictions where the manufacturer would want the agreement to terminate if a particular provision becomes illegal; for example, payment obligations become illegal because of the institution or alteration of foreign exchange controls).

j) Waivers (not binding).

k) Exclude headings in interpretation.

l) Notices (how and when effective; oral and written).

m) Force majeure (should state that it does not apply to payment obligations; consider allowing the parties to terminate the agreement if the force majeure continues for a specified period of time, (e.g. 90 days).

n) Registration of agreement, if required.

o) Distributor/sales representative shall comply with all applicable laws.

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